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Supreme Court, U.S.
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NO. 09-11556

IN THE SUPREME COURT OF THE UNITED STATES

JOSE TOLENTINO,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

Respondent's Brief in Opposition repeatedly characterizes the Department of Motor Vehicles (DMV) records as "mere identity" evidence in an attempt to distinguish this case from those Federal Circuit cases dealing with the suppression of Alien Files (A-Files) (See Respondent's Brief at 8-12). Yet, both our case and the Federal cases we rely on all deal with evidence that is maintained in government files that investigating law enforcement personnel could not have accessed without information obtained during the illegal stop. This absurd distinction advanced by Respondent underscores the need for this Court to hear this case. It crystallizes the need for this Court to clarify its ruling in Immigration and Naturalization Service (INS) v. Lopez-Mendoza, 468 U.S. 1032 (1984), to address whether this Court intended to categorically eliminate certain evidence from the exclusionary rule solely because it is derived from "identity" or whether it was upholding the Ker-Frisbie doctrine that requires evidence – not the defendant himself -- to be the "fruit" of a suppression motion.

"Mere identity" is who you are, your name, body, identity. "Mere identity" is not subject to suppression for a very sound reason: because courts need to know who a criminal defendant is in order to confer jurisdiction over that individual. Despite Respondent's assertions to the contrary, Petitioner has always

acknowledged that a person's identity is not subject to suppression (See Petition at 22-24).

However, Petitioner does object to Respondent's assertion that DMV records are equivalent to "mere identity." (Respondent's Brief at 10-11, 13). Indeed, from a common sense perspective, Respondent's assertion is absurd. DMV records cannot be equated with "mere identity." They are a separate and distinct document of a person's driving record compiled by the government to help implement the rules of the road. DMV records, or any other type of pre-existing identity-related documentary records for that matter, are stored in such a way that they can be accessed by reference to certain identifying information (name, social security number, fingerprint, etc.). A person could still be made to appear in court -- in a jurisdictional sense -- whether or not the documents ultimately passed Constitutional muster and were allowed to be introduced as evidence in the case. There is no intelligent reason to exclude the category of identity-related evidence from the suppression rule, and this Court has never articulated such a rule.

If this Court allows this misperception of the law to persist, arbitrarily excluding identity-related evidence from suppression, this will lead to nonsensical results. Even now, Respondent and the courts below have fashioned a rule that would allow the exclusionary rule to apply where fingerprint evidence is used to access documentary evidence, but disallow the rule where the evidence is accessed

through reference to a name alone. This rule would mean that people who refuse to give their name to the police, or give a false name, or give a true name that is common (such as John Smith) so that the police must refer to additional identifying information to retrieve the proper file would be permitted to move for suppression of their DMV records, even though their counterparts, whose records were accessed through reference to their name, would be shut out from this avenue of recourse.

Additionally, this rule singling out identity-related evidence from suppression would lead to a hodge-podge deterrent effect. Would this Court condone a rule allowing suppression of only certain types of evidence obtained after an illegal seizure, regardless of the deterrent circumstances of the case? Does it make any sense that physical evidence such as guns and contraband are suppressible but documentary evidence is not? Does there exist any policy reason to exclude pre-existing identity-related evidence from the suppression rule with new, document-based crimes such as identity-theft being added every year? This Court can shed light on how the exclusionary rule applies where documentary evidence forms the basis of the investigation and prosecution of crime, in cases involving computers, cyber crime, identity-theft and other document-related crime.

This is not to say that all evidence obtained after unlawful police action must be suppressed. On the contrary, it is indisputable that evidence obtained by

"means sufficiently distinguishable" from the "primary illegality" will be found to be "purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963). The rationale has always been that evidence will be exempted from the exclusionary rule when there is only an "attenuated connection" between the Fourth Amendment violation and the derivative evidence, where a court concludes that the deterrent effect of suppressing the evidence is of minimal value. Nowhere in this analysis is there room for excluding "identity-related" evidence because it is accessed through files organized by name.

Indeed, since a fact-finding hearing was never conducted in this case, we do not know exactly what identifying features were elicited from Mr. Tolentino in order to access his DMV records. Indeed, it is possible that this case required more information than defendant's name, or "mere identity," in order to locate the correct DMV files, thereby qualifying him for a suppression hearing under Respondent's rationale (Respondent's Brief at 11).

This case began with Petitioner filing a motion to suppress. In that motion, Petitioner alleged that he was stopped arbitrarily by police on a fishing expedition trying to catch unlicensed drivers and other illegality. The exclusionary rule exists in order to protect people from just this type of unreasonable interference by the police, and suppression of the resultant evidence fulfills the societal need to deter unlawful police behavior. Petitioner's allegations set forth the quintessential

reason this Court established the exclusionary rule, to protect citizens from unreasonable interference by the police.

In stark contrast, Respondent alleged in the response to the motion to suppress that the police seized Petitioner because he was playing loud music from his vehicle (See Pet. App. A39). Despite the court below's statement to the contrary (See Pet. App. A2), these facts have not been proven. None of the allegations concerning the circumstances surrounding the stop of Petitioner's motor vehicle have been put to the test because the trial court denied the suppression motion on the ground that DMV records are not suppressible fruit. Since the hearing was never granted and the facts underlying this case were never fleshed out, Respondent's assertion that the DMV records were obtained for administrative purposes, not investigatory purposes, is inaccurate (See Respondent's Brief at 11-12). Had a hearing been held, this issue would likely have been examined and may indeed have provided grounds for denial of the suppression hearing. However, since the motion court denied the suppression motion outright, without conducting a hearing, on the ground that DMV records are not suppressible fruit, Respondent cannot assert that this case does not follow the line of federal cases allowing suppression of fingerprint evidence in section 1326 cases where the fingerprint evidence was collected for investigatory purposes, exploiting the unconstitutional arrest. See United States v. Olivares-

Rangel, 458 F.3d 1104, 1121 (10th Cir. 2006); United States v. Oscar-Torres, 507 F.3d 224, 231-32 (4th Cir. 2007); United States v. Guevara-Martinez, 262 F.3d 751, 755-56 (8th Cir. 2001).

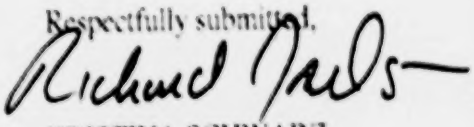
For this reason, Petitioner further objects to Respondent's characterization of this case as a poor vehicle for resolving questions about the scope of the exclusionary rule (See Respondent's Brief at 15-16). Indeed, because there was no factual hearing conducted, this case provides an excellent opportunity for this Court to shed clarity on this confusing area of the law of suppression, without the need to refer to a specific factual determination. This Court can answer whether Lopez-Mendoza should be interpreted to mean that jurisdictional identity cannot be suppressed or whether it is meant to exempt all identity-related evidence from suppression, even though obtained through violation of the Constitution. Because there was no fact-finding hearing, his case allows the Court to be free to craft a careful articulation of the status of the exclusionary rule, address how the rule applies to identity-related evidence, and resolve the split in the Circuit Courts concerning the applicability of the exclusionary rule to documentary evidence maintained by the government. The only question that needs to be resolved is whether governmental identity records are subject to the suppression rule. If so, a hearing should be granted; if not, then a clear message needs to be sent to guide courts to harmonize their decisions.

Petitioner's contention is that this Court should take this opportunity to reaffirm its holding in Lopez-Mendoza, explain the jurisdictional ramifications of the "body" or "identity" language in that case, and insert clarity into the question whether DMV records and other pre-existing government-compiled documents accessed by the police and utilized to justify an arrest should be considered suppressible "fruit" of unlawful police action violative of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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